



# Forest Appeals Commission

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## APPEAL NO. 1998-FOR-06

In the matter of an appeal under section 131 of the *Forest Practices Code of British Columbia Act*, R.S.B.C. 1996, c. 159.

**BETWEEN:** Alan R. Luoma **APPELLANT**

**AND:** Government of British Columbia **RESPONDENT**

**AND:** Forest Practices Board **THIRD PARTY**

**AND**

## APPEAL NO. 1998-FAB-04

In the matter of an appeal under section 146 of the *Forest Act*, R.S.B.C. 1996, c.157.

**BETWEEN:** Alan R. Luoma **APPELLANT**

**AND:** The Province of British Columbia  
(Ministry of Forests) **RESPONDENT**

**BEFORE:** Toby Vigod Panel Chair  
Bruce Devitt Member  
Kathy Lewis Member

**HEARING DATE:** February 23-24, 1999

**PLACE:** Campbell River, B.C.

**APPEARING:** For the Appellant: Douglas Marion, Counsel  
For the Respondent: Bruce Filan, Counsel  
For the Third Party: Calvin Sandborn, Counsel

## APPEAL

Alan R. Luoma has appealed the decisions of two Review Panels dated May 22, 1998. Both Review Panels, chaired by Ken Mathews, reviewed the decision of Donald Sluggett, District Manager, dated March 6, 1998, which found a number of contraventions under the *Forest Practices Code of British Columbia Act* ("the Code")

and the *Forest Act*, R.S.B.C. 1979, c. 140. The District Manager found that Mr. Luoma contravened sections 96(1) and 97(2) of the *Forest Practices Code of British Columbia Act*. Mr. Luoma was assessed a penalty of \$14,369.41 for the contravention of section 96(1) and a penalty of \$2500 for the contravention of section 97(2) of the *Code*. Mr. Luoma was also found to have contravened section 138(1) of the *Forest Act* and assessed a penalty of \$29,421.15 for that contravention.

One of the Review Panel decisions confirmed the decision of the District Manager in regard to the contraventions and penalties assessed under the *Code*. The other Review Panel decision found that Mr. Luoma should be afforded an opportunity to be heard in respect of the contravention of section 138(1) of the *Forest Act*. It referred the determination back to the District Manager for him to re-consider and make a new determination.

The appeal of the Review Panel's decision dealing with the contraventions of the *Code* was brought before the Forest Appeals Commission (the "Commission") pursuant to section 131 of the *Code*.

The appeal of the Review Panel's decision dealing with the contravention of the *Forest Act* was brought before the Appeal Board pursuant to section 146(1)(a) of the *Forest Act*. The Appeal Board was appointed by Order-in-Council No. 0818, approved on July 9, 1998.

The two appeals were heard together.

Mr. Luoma is seeking an order setting aside the District Manager's determination and the two Review Panel decisions.

## **BACKGROUND**

Mr. Luoma is the owner of Lot A of District Lot 765, Quadra Island, Sayward Land District, Plan VIP55123. Immediately to the north and adjacent to Lot A is Crown land. Mr. Luoma purchased Lot A from Crown Forest Industries Limited (now TimberWest Forest Limited) in October 1992. Prior to Mr. Luoma's purchase, timber had not been harvested on Lot A nor had there been any timber harvested on the Crown land adjacent to the lot. On an application for a timber mark, dated October 15, 1992, Mr. Luoma estimated that there were 1000 cubic metres of timber on his property. A timber cruise done by Crown Forest Industries Limited, prior to the sale of the property, estimated 1040 cubic metres of timber on Lot A.

In December 1996, Todd Powell, Forest Officer for the Campbell River Forest District, received a tip from the RCMP that there was a possible case of unauthorized harvesting occurring on Crown land adjacent to Lot A. Mr. Powell inspected the area, determined that there was a likelihood of unauthorized harvest, and concluded that further investigation was necessary. Mr. Powell seized one load of logs delivered to Campbell River Mills under Mr. Luoma's trademark.

In a letter dated December 4, 1996, from Rory Annett, former Operations Manager, Campbell River Forest District, Mr. Luoma was advised that he was being investigated for possible contraventions under sections 96(1), 97(2) and 102(1) of the *Code* and that it also appeared that Crown timber adjacent to Mr. Luoma's lot may have been cut, removed, damaged or destroyed without authority under the *Forest Act*.

The investigation was handed over from Mr. Powell to Russell Boucher, Forest Officer, Campbell River Forest District, between December 1996, and January 1997. Mr. Boucher checked the volumes sold under Mr. Luoma's timber mark against the Ministry of Forest's ("MOF") harvest billing reports and Campbell River Mills invoices. A number of discrepancies were found. Mr. Luoma had estimated a volume of 1000 cubic metres on his application for a timber mark. However, according to MOF information, a total of 5058.9 cubic metres was scaled to the timber mark between October 31, 1992 and October 31, 1996. Records acquired from Campbell River Mills indicate that Mr. Luoma sold 4387.5 cubic metres to the mill, for \$325,276.43, between October 1992 and October 1996. Scaling records also show that Mr. Luoma sold timber to Coast Mountain Hardwoods and CIPA Lumber Limited.

On January 16, 1997, David Steele, Regional Enforcement Specialist, and Mr. Boucher inspected the site. Two pins on adjacent lots were located; however, due to snow cover, no corner pins for Mr. Luoma's lot were located. Mr. Steele and Mr. Boucher returned on January 21, 1997 and January 24, 1997 to do further site inspections. They noticed that a number of the stumps had been loosely covered with moss. A blue ribboned line was found approximately 15-20 metres north of the northern boundary of Lot A.

On February 5, 1997, Mr. Steele and Ken Miller, a scaler with the Campbell River Forest District, completed a stump cruise for all stumps located on Crown land to the northeast of the blue-ribboned line. This became known as stump cruise area "A", containing a volume of 232 cubic metres.

On February 17, Don Young, a legal surveyor, who had done the 1991 survey prior to the purchase by Mr. Luoma, was contracted by MOF to re-establish the boundary of the lot. He started locating the northern boundary of Lot A when he was approached by Mr. Luoma and told to leave the property. The survey was completed by Mr. Young's associate, Ray Chicalo, B.C.L.S., on March 26, 1997. On that same date, Mr. Miller completed the stump cruise for the area between the legal boundary and the blue-ribboned line where the previous cruise, done on February 5, 1997, had started. This became known as stump cruise area "B", containing a volume of 150 cubic metres. There was also a section within stump cruise "B", that had been stumped and was not included in the stump cruise. This became known as the "stumped area". It contained a volume of 136.4 cubic metres as estimated by using average volumes per hectare from three similar sites.

On June 20, 1997, Mr. Sluggett wrote to Mr. Luoma notifying him of the potential contravention of sections 96(1) and 97(2) of the *Code*. The letter informed Mr.

Luoma of an opportunity to be heard and asked him to contact his office by July 15, 1997, in this regard.

Mr. Luoma's counsel wrote to Mr. Sluggett on July 15, 1997 indicating that Mr. Luoma wanted an opportunity to be heard prior to any determination being made. An opportunity to be heard ("OTBH") meeting was originally scheduled to be held on November 14, 1997. It was adjourned and the OTBH meeting commenced on November 21, 1997. At that time, counsel for Mr. Luoma requested an adjournment to research the law involving self-incrimination at administrative hearings. The OTBH was concluded on December 12, 1997.

On March 6, 1998, the determination was issued. The District Manager found that unauthorized harvesting adjacent to Mr. Luoma's lot had occurred. He indicated that the unauthorized harvest was in contravention of either section 138(1) of the *Forest Act*, if it occurred prior to June 15, 1995, or section 96(1) of the *Code*, if it occurred after that date. He determined that contraventions for the unauthorized harvesting of timber under both statutes had occurred. The District Manager found that Mr. Luoma had committed wilful theft under the *Forest Act* and that the action was deliberate under the *Code*. Mr. Sluggett also found that a contravention of section 97(2) of the *Code* had occurred (failure to ascertain the boundaries of private land).

He found that the total volume of unauthorized timber harvested was 518.4 cubic metres. By pro-rating the volumes and dates of scaling, Mr. Sluggett determined that 422.9 cubic metres should be considered under the *Forest Act*, and 95.5 cubic metres should be considered under the *Code*. He determined that the penalties should be \$29,421.15 pursuant to section 139 of the *Forest Act* for the contravention of section 138(1), and \$14,369.41 pursuant to section 119 of the *Code* for contravention of section 96(1). He also assessed a penalty of \$2500 under section 117 of the *Code* for the contravention of section 97(2).

The determination was reviewed and two decisions of the Review Panel were issued on May 22, 1998, in relation to the contraventions under the *Forest Act* and the *Code*, respectively. The Review Panel decided, in relation to the contravention of the *Forest Act*, that the fact that Mr. Luoma was not advised that he was being investigated for a *Forest Act* contravention could amount to unfairness. While the Review Panel noted that the December 4, 1996 letter from Mr. Annett mentions the possibility of a *Forest Act* contravention, it found that this was not sufficient notice due to the subsequent correspondence which only referred to the *Code* proceedings. The Review Panel referred this determination back to the District Manager for him to re-consider and make a new determination. A new determination was issued by Mr. Sluggett on August 31, 1998, upholding the finding of the contravention of section 138(1) of the *Forest Act* and the penalty of \$29,421.15.

The other Review Panel decision of May 22, 1998, upheld the determination and the penalties levied in relation to the contravention of section 96(1) and section 97(2) of the *Code*.

Both Review Panel decisions directed the District Manager to investigate the use of Mr. Luoma's timber mark in order to determine whether there were other contraventions of the *Forest Act, Code* and supporting regulations.

## **ISSUES**

The Appellant identified a number of grounds of appeal in his Notices of Appeal and his Statements of Points. At the hearing, the issues were narrowed to the following:

1. Whether Mr. Luoma was responsible for the unauthorized harvesting of timber on Crown land adjacent to his property.
2. If Mr. Luoma is responsible, when did the unauthorized harvesting of timber occur, and what is the appropriate penalty?
3. Whether there was a contravention of section 97(2) of the *Code*.
4. Whether the Review Panel erred in referring the *Forest Act* determination back to the District Manager for him to reconsider and make a new determination and hold a new OTBH meeting relative to sections 138 and 139 of the *Forest Act*, after having already found that sections 138 and 139 had been contravened.
5. Whether the Review Panel erred in directing the District Manager to investigate the use of the timber mark involved in order to determine whether there were other contraventions of the *Forest Act, Code* and supporting regulations.

The Appellant had initially raised as a ground of appeal that the Review Panel erred in concluding that he was provided a full opportunity to be heard at the OTBH meeting in relation to the contraventions of the *Code*. Mr. Luoma had refused to give evidence at the OTBH meeting, due to his concern that it could potentially be used against him if Crown Counsel prosecuted him for an offence under the *Code* at a later date. He then appealed to the Commission on the ground that he was not provided a full opportunity to be heard at the OTBH meeting. At the hearing before this Panel, counsel for Mr. Luoma abandoned this ground of appeal. He indicated that he had reviewed the cases submitted by the Forest Practices Board, including *R. v. Carlson*, [1984] B.C.J. No. 2725 (B.C.S.C.) September 14, 1984, where the Court found that testimony of the accused, even though it was not given under oath at an earlier administrative proceeding, could not be led against the accused, due to the protection of section 13 of the *Canadian Charter of Rights and Freedoms*. Counsel for Mr. Luoma indicated, at the hearing before this Panel, that had Mr. Luoma testified at the OTBH meeting, it appeared that his evidence could not have been led by the Crown at any later prosecution under the *Code*.

Counsel for Mr. Luoma urged the Panel to make a finding that this would be the case. The Respondent submitted that due to the fact that this ground of appeal has been abandoned, that the Panel need not make such a ruling. The Panel concurs and will not making a finding on this point.

## RELEVANT LEGISLATION

The relevant legislative provisions of the *Code* are as follows:

### Unauthorized timber harvest operations

- 96** (1) A person must not cut, remove, damage or destroy Crown timber unless authorized to do so
- (a) under an agreement under the Forest Act or under a provision of the Forest Act,
- (2) If a person cuts, removes, damages or destroys Crown timber contrary to subsection (1), at the direction of, or on behalf of, another person, that other person also contravenes subsection (1). Private land adjacent to Crown land
- 97.** (1) Before an owner or occupier of private land adjacent to Crown land authorizes another person to cut or remove timber from the private land, the owner or occupier must inform that other person of the boundaries of the private land.
- (2) Before a person cuts or removes timber from private land adjacent to Crown land, the person must ascertain the boundaries of the private land.

### Penalties

- 117** (1) If a senior official determines that a person has contravened this Act, the regulations, the standards or an operational plan, the senior official may levy a penalty against the person up to the amount and in the manner prescribed.
- (2) If a person's employee, agent or contractor, as that term is defined in section 158.1 of the Forest Act, contravenes this Act, the regulations or the standards in the course of carrying out the employment, agency or contract, the person also commits the contravention.
- ...
- (4) Before the senior official levies a penalty under subsection (1) or section 119, he or she
- (a) must consider any policy established by the minister under section 122, and
  - (b) subject to any policy established by the minister under section 122, may consider the following:
    - (i) previous contraventions of a similar nature by the person;
    - (ii) the gravity and magnitude of the contravention;
    - (iii) whether the violation was repeated or continuous;
    - (iv) whether the contravention was deliberate;
    - (v) any economic benefit derived by the person from the contravention;

- (vi) the person's cooperativeness and efforts to correct the contravention;
- (vii) any other considerations that the Lieutenant Governor in Council may prescribe.

### **Penalties for unauthorized timber harvesting**

- 119** (1) If a senior official determines that a person has cut, damaged, removed or destroyed Crown timber in contravention of section 96, he or she may levy a penalty against the person up to an amount equal to
- (a) the senior official's determination of the stumpage and bonus bid that would have been payable had the volume of timber been sold under section 16 of the Forest Act, and
  - (b) 2 times the senior official's determination of the market value of logs and special forest products that were, or could have been, produced from the timber.

The relevant sections of the *Forest Act*, R.S.B.C. 1979, c. 140 are as follows:

- 138.** (1) No person shall cut, remove, damage or destroy Crown timber otherwise than
- (a) under and in compliance with an agreement entered into or an authority given under this or the former Act, or the regulations;
- 138.1** (1) An owner or occupier of private land adjacent to Crown land shall not authorize another person to cut or remove timber from the private land without first having informed that other person of the boundaries of the private land.
- (2) No person shall cut or remove timber from private land adjacent to Crown land without first having ascertained the boundaries of the private land.
- 139.** (1) Where section 138(1) is contravened, the regional manager or district manager may
- (a) require the person who contravened it to pay to the Crown, in addition to any other penalty under this Act, or under an agreement entered into under this or the former Act,
    - (i) royalty or stumpage under Part 7 at the rates of royalty or stumpage payable at the time of cutting, removal, damage or destruction contrary to section 138(1) or, if that time is not known to the ministry, at the time when the cutting, removal, damage or destruction became known to the ministry,
    - (ii) the higher of the bonus bid, if any, or the average bonus bid calculated in accordance with subsection (1.1), and
    - (iii) a penalty not exceeding

- (A) 3 times the royalty or 3 times the stumpage under Part 7, and
  - (B) 3 times the higher of the bonus bid, if any, or the average bonus bid, as calculated in accordance with subsection (1.1), as determined by the regional manager or district manager,
- (b) seize or authorize a forest officer to seize the timber, and
  - (c) sell by public or private sale timber seized under paragraph (b).

## DISCUSSION AND ANALYSIS

### 1. Whether Mr. Luoma was responsible for the unauthorized harvesting of timber on Crown land adjacent to his property.

There is no dispute that approximately 518.4 cubic metres of timber was taken without authority from Crown land adjacent to the northern boundary of Lot A. However, counsel for Mr. Luoma submits that the Respondent has not proven, on a balance of probabilities, that he was involved in the unauthorized harvesting of timber on Crown land adjacent to his property. He argues that Mr. Boucher admitted that there was no direct evidence that Mr. Luoma either did or was responsible for the unauthorized harvesting. There were no witnesses called who could identify who did the logging on Crown land and there was no evidence of contracts to log that land. Counsel for Mr. Luoma argues that while Mr. Annett testified that he had seen a skidder in 1993-94 on Lot A with Mr. Luoma standing nearby, and that he had seen a skidder and excavator at Mr. Luoma's property up the road (District Lot 764), Mr. Annett did not actually see Mr. Luoma operate the equipment. Counsel for Mr. Luoma also argues that while Mr. Boucher saw a skidder in the south-east part of Lot A in January or February 1997, Mr. Boucher did not see Mr. Luoma operate the equipment. Counsel for Mr. Luoma argues that the Respondent is asking the Panel to draw a series of inferences upon inferences to come to the conclusion that Mr. Luoma is responsible for the unauthorized harvesting.

Counsel for Mr. Luoma says the evidence of loose moss found on approximately one-third of the stumps in stump cruise area "A" could be evidence of trying to hide the activity from Mr. Luoma, or the MOF. Further, he says that while the use of Mr. Luoma's timber mark by others could be the subject of a separate proceeding, it does explain some of the excess timber being sold against his timber mark.

The Respondent submits that there are a number of facts known that lead to the conclusion that Mr. Luoma is responsible for the unauthorized harvesting. First of all, it is known that before Mr. Luoma purchased the property in October 1992, the property was timbered. Second, Mr. Luoma applied, on October 15, 1992, and received a timber mark for Lot A. It is known that he either logged or had his own property logged. He was seen on Lot A by Mr. Annett in 1993-94, near a skidder, when logging was taking place. It is known that Mr. Luoma is a logger and knows how to operate logging equipment. This was confirmed by John Daigle who gave evidence on behalf of Mr. Luoma. Mr. Daigle has rented a trailer on Lot A since



October 1996. Mr. Daigle testified that Mr. Luoma knew how to operate an excavator, and that he had seen a skidder on Lot A, prior to moving onto his property.

The Respondent also submits that when Mr. Luoma initially lived up the road from Lot A, he would have driven by Lot A to get to the ferry and get supplies and that he would have seen any logging taking place near his property. Logging equipment was seen on both his property up the road on Lot 764 and on Lot A. Further, the Respondent submitted that the area is rural, with only a few residences in the vicinity of Lot A, and there was not a lot of opportunity for others to engage in the trespass activity without Mr. Luoma knowing about it. The Respondent says that information from the assessment rolls show that Mr. Luoma was assessed for a two-story house on Lot A for the first time in 1996, which meant that the house was probably built in 1995.

The Respondent also referred to a letter from Mr. L. Kirkby, that Mr. Luoma submitted to the District Manager at the first OTBH. The letter stated that in the late fall of 1996, Mr. Kirkby contracted with Mr. Luoma to cut five loads of Douglas-fir on his property. Mr. Kirkby stated, in the letter, that he allowed Mr. Luoma, as contractor, to mark the first three loads with his timber mark. The Respondent says that besides raising the issue of an improper use of a timber mark, the letter points out that Mr. Luoma was actively logging in 1996, and using his timber mark.

The Respondent also states that while there is no direct evidence of where the timber taken from the Crown land went, it is known that approximately 5000 cubic metres have been logged against Mr. Luoma's timber mark, while only 1000 cubic metres were estimated on his application form. The Respondent says that an inference can be drawn that some of it was Crown timber.

The Respondent also says there is evidence of skidder trails that went into stump cruise area "A" from Mr. Luoma's property. There were no other roads leading into that area except across his property. Mr. Daigle described a number of roadways near Lot A. The Respondent submits that while it appeared that Mr. Luoma called Mr. Daigle to try to suggest that there was another way to get timber off the Crown land without Mr. Luoma seeing it, Mr. Daigle's evidence did not lead to that conclusion. The Respondent says that, under questioning, Mr. Daigle stated that a road at the northeast corner of Lot A went nowhere, and that a roadway leading in an easterly direction from the southeast corner, got rougher, and also went nowhere. Further, a roadway along the southern boundary eventually went through Mr. Luoma's property. According to Mr. Boucher, this was also a rough road incapable of carrying a logging truck. It had a stump in middle, an adverse 45-degree angle, and no evidence of damage to trees caused by logging equipment. The Respondent submits that all of the skidder trails that went from stump cruise area "A" to Mr. Luoma's property eventually intersected with the main driveway out of his property.

The Respondent also says that, besides the skid trails between stump cruise area "A" and Mr. Luoma's property, there is a further connection between the trespass

area and Mr. Luoma's property. There was evidence of a dug-out on Lot A that was not there before the property was purchased by Mr. Luoma in 1992. The area around the dug-out was disturbed. The stumped area on the Crown land was contiguous with the dug-out, and there was a mound of brush located near the dug-out. The Respondent says this was all consistent with Mr. Luoma being responsible for the unauthorized harvesting.

The Respondent also urged the Panel to make an adverse inference against Mr. Luoma for failing to testify at this hearing. The Respondent argued that while Mr. Luoma chose not to testify at the OTBH before the District Manager or at the Review Panel proceedings, that was because he was concerned about self-incrimination and making statements that could be used against him at a later prosecution. However, the Respondent submits that as Mr. Luoma now says that he no longer has a concern that his statements would not be protected, and still chooses not to testify, an adverse inference should be drawn.

The Panel finds that, on a balance of probabilities, Mr. Luoma is responsible for the unauthorized harvesting of timber on the Crown land adjacent to the northern boundary of his property on Lot A. There is no real dispute that the unauthorized harvesting took place subsequent to the purchase of Lot A by Mr. Luoma. There is no debate that Lot A and the adjacent Crown land was timbered at the time Mr. Luoma purchased the property in 1992. This is evidenced by aerial photographs taken in 1991. Further, Mr. J.D. Young, B.C.L.S., who originally surveyed the property on May 30, 1991, indicated that the area along the north boundary of Lot A was covered by timber at the time of the survey. In addition, a letter from R.G. Hill, RPF, Manager, Production Planning, TimberWest Forest Limited, a representative of the former owner, states that the Crown land along the northern boundary of Lot A and the area north of Lot A was timbered in October 1992, at the time the property was transferred to Mr. Luoma.

At the time the property was transferred to Mr. Luoma, he resided on Lot 764, a short distance north of Lot A, along Granite Bay Road. The Panel agrees with the Respondent that this property was close enough for Mr. Luoma to work at developing Lot A (including logging/clearing, building a dug-out and a two story residence) and to keep an eye on it. The Panel finds that it would have been very difficult for anyone else to harvest over 500 cubic metres of timber on Crown land adjacent to Lot A, without Mr. Luoma's knowledge.

The Panel finds that on October 15, 1992, Mr. Luoma applied for and received a Private Timber Mark, to log an estimated volume of 1000 cubic metres from Lot A. This amount was consistent with a field cruise supplied by Crown Forest Industries Limited, the former owner of Lot. A. The Panel also finds that approximately 5000 cubic metres, a volume of wood much greater than that applied for by Mr. Luoma was logged under his timber mark. Evidence was submitted to show that some of this wood came from other properties on Quadra Island, but not enough to account for the discrepancy in volume of approximately 4000 cubic metres.

Mr. Daigle testified that no logging activity was taking place in October 1996 when he took up residence on Lot A. Therefore, the Panel concludes that between the period of 1992 and October 1996, the logging of Lot A and the adjacent Crown lands to the north and north-east occurred. Mr. Daigle testified that Mr. Luoma knew how to operate logging equipment such as an excavator, and that an excavator and skidder had been seen parked near his old residence on Lot 764 on Granite Bay Road. Mr. Boucher had also seen a skidder on Lot A in January or February 1997. The Panel also finds that the skid trails that went from the Crown land to Lot A were the only viable route for bringing out the Crown timber to the main roads, via the driveway on Mr. Luoma's property. The evidence shows that there was little opportunity that others could have access to the timber on Crown land without traversing Lot A.

The evidence of Mr. Boucher and Mr. Steele indicated that approximately 1/3 of the stumps in stump cruise area "A" were deliberately covered by moss and other vegetative material in an attempt to hide them. Mr. Zeglen confirmed that this was not as a result of natural biological processes. Messrs. Boucher and Steele also testified that white guard markers for the property corner pins had been moved and that a line had been sparsely marked with blue ribbon about 15-20 metres north of the northern boundary of Lot A. Mr. Young testified that he was present during the placement of the iron pins and white marking posts at the time of the original survey in 1991. He stated that when he was re-establishing the boundary in February 1997, the iron pins and monuments were located in their proper locations, although the white marker posts had been moved from the location where he had placed them during the original survey in 1991. There was no evidence of who placed the blue ribbon or moved the white markers, but it provides evidence of attempts to hide the trespass.

The Panel concludes that, on the balance of probabilities, that Mr. Luoma is responsible for the logging of the Crown timber. Unfortunately, Mr. Luoma has remained silent throughout all the proceedings regarding this case. Initially, because the option existed for a prosecution, Mr. Luoma stated that he did not wish to incriminate himself. However, at this hearing, while counsel for Mr. Luoma agreed that the case law was clear that any evidence given by Mr. Luoma could not be used against him in a subsequent criminal proceeding, Mr. Luoma chose to remain silent and offered no explanation for the trespass.

There is a well-recognized rule that the failure of a party or a witness to give evidence, which it was in the power of the party or witness to give and by which the facts might have been elucidated, justifies the court in drawing the inference that the evidence of the party or witness would have been unfavourable to the party to whom the failure was attributed (Sopinka, J. and Lederman, Sidney, *The Law of Evidence in Civil Cases*, Butterworths, Toronto, 1974 at 535-6). The Panel finds that in the circumstances of this case, an adverse inference can be made against Mr. Luoma for his failure to testify. His evidence would have been key to refuting the case made by the Respondent. Mr. Luoma's concern about self-incrimination was not present at this hearing and yet he chose not to testify before this Panel.

However, even if this were not an appropriate case to draw such an inference, the weight of the evidence supports the Respondent's version of event. Mr Daigle was the only witness called by Mr. Luoma and he did not assist him in establishing that anyone other than Mr. Luoma or someone he authorized could have removed 518 cubic metres of timber from the Crown land adjacent to Lot A. The very strong circumstantial evidence produced by the Respondent has not been refuted by Mr. Luoma.

The Panel agrees with the findings of the District Manager and the Review Panels and finds that, based on all the evidence before it, that Mr. Luoma knowingly caused the unauthorized harvesting of timber on the Crown land adjacent to Lot A to occur.

## **2. If Mr. Luoma is responsible, when did the unauthorized harvesting of timber occur and what is the appropriate penalty?**

The Appellant submits that if the Panel finds that he is responsible for the unauthorized harvesting of Crown timber, it still must determine whether the harvesting occurred prior to, or after, June 15, 1995, the date of the proclamation of the *Code*. If the unauthorized harvesting occurred prior to June 15, 1995, then the provisions of the *Forest Act* apply. The provisions of the *Code* apply to any unauthorized harvesting of timber after that date. The Appellant disagrees with the District Manager and Review Panel, which found that some of the unauthorized harvesting occurred after June 15, 1995. He argues that there is no evidence to find that any unauthorized harvesting occurred after June 15, 1995, and therefore, if he is found to be responsible, the Panel should only make a finding of a contravention and assess a penalty under the *Forest Act*, in accordance with the methodology used by the District Manager. On the other hand, the Respondent submits that all the unauthorized harvesting took place after June 15, 1995.

Counsel for Mr. Luoma refers to statements made by Mr. Boucher in a written narrative that he prepared in November 1997, and revised in April 1998. In that narrative, Mr. Boucher states that on January 21 and 24, 1997, when he and Mr. Steele went out to the site, "indications of recent activity were seen on Crown Land" and that "some of the stumps have been covered with moss and or branches". He indicated that on January 24th: "Skid trails were walked and stumps that were covered by moss or branches were located and photos taken." Counsel for Mr. Luoma says that Mr. Boucher's ability at the hearing to point to fresh foliage in the approximately 30 photos taken at the site was "limited in the extreme." He also said that Mr. Boucher referred to the presence of sawdust near some stumps in stump cruise area "A" for the first time at the hearing before this Panel, and could only point to one patch in one of the photos.

Counsel for Mr. Luoma also argued that the evidence of David Steele, a witness called by the Respondent, should not be given much weight. Mr. Steele has been employed by MOF for the past 25 years. Since 1997, he has been a senior investigator for the Vancouver Forest Region Compliance and Enforcement Section. Mr. Steele was a revenue log scaler from 1973-84 and a check scaler from 1984-

90. From 1990-97, he was a forest revenue inspector, whose duties included assessing unauthorized harvests and stump cruises. Mr. Steele was qualified as an expert to provide opinion evidence on the timing of the timber harvesting. Mr. Steele testified that, in his opinion, the logging in stump cruise area "A", which was selectively logged, took place 8-12 months prior to his attendance at the site in January 1997. Mr. Steele stated that it was his opinion that the logging in stump cruise area "B", which was more of a clear cut, took place 12-18 months prior to January 1997. He also testified that the "stumped area" was probably logged about the same time as the rest of stump cruise area "B".

Counsel for Mr. Luoma argues that Mr. Steele is primarily an investigator or a timber cruiser, and is not a forester or a biologist, and that, therefore, his opinion should not be given much weight. He says that there is not much in the way of evidence of freshness of leaves, and cuts in relation to stump cruise area "A". In regard to stump cruise area "B", counsel for Mr. Luoma argues that Mr. Steele himself said it was very hard to pinpoint the timing of the logging at that location. He also argues that Mr. Boucher approached the whole incident initially as a contravention of the *Code*, thereby raising the question of when the logging occurred. Counsel for Mr. Luoma says that this may have led Mr. Steele to advance an opinion that is hard to substantiate on an objective basis. He also notes that while Mr. Steele himself was involved in doing the stump cruise in area "A", he did not do the stump cruise in area "B".

Counsel for Mr. Luoma also referred to the testimony of Stefan Zeglen, who has been the regional forest pathologist for the Vancouver Forest Region since 1994. Mr. Zeglen was qualified to give expert testimony on the changes in appearance to cut coniferous trees. While Mr. Zeglen did not attend the site, he testified that he would expect almost all the needles from Douglas fir to be shed within 6 months after felling. Mr. Zeglen indicated that once the needles were gone, he could not give an opinion on when the trees were cut just by looking at photos; he would have to examine the wood. Counsel for Mr. Luoma said that almost all the trees in the photos were needleless.

The Appellant also submitted that log purchase information showed that Campbell River Mills had purchased 493.3 cubic metres under his timber mark in 1996 and that if one took off the 150 cubic metres taken out from Mr. Kirkby's property under Mr. Luoma's timber mark in 1996, only 347 could have been taken from Crown land in 1996. The total amount of unauthorized harvesting was 518 cubic metres. While that amount could have come out after June 15, 1995, counsel for Mr. Luoma argued that this was unlikely.

Finally, counsel for Mr. Luoma refers to a letter dated November 27, 1997, from Tom Miller, Operations Engineer, TimberWest Forest Limited, to MOF, in which he refers to field inspections of trespassed wood made by TimberWest in December 1996. He states that tree stumps were found on TimberWest's private land where logs had been removed within the previous month or two without its authority. Mr. Miller's letter noted that: "Tree stumps were found on Crown land immediately north of private lot 765 where logs had been removed without authority. The time

period when the logs were removed was difficult to determine accurately, however, by my estimation the cutting occurred sometime within the previous 2 years of our visit." While counsel for Mr. Luoma submits that this letter can not be given much weight as Mr. Miller was not a witness at the hearing, he says that his estimation of 2 years would place the cutting of the Crown timber prior to June 15, 1995.

The Respondent disagrees with the methodology employed by the District Manager and upheld by the Review Panel to determine what volume of timber was taken prior to 1995 and what volume was taken after that date. It argues that all of the unauthorized harvesting occurred after June 15, 1995. In this regard, the Respondent relies on the evidence of Mr. Steele, Mr. Boucher and Mr. Zeglen. The Respondent says while the photos are helpful, they were taken primarily to demonstrate the trails, the stumps with moss on them and the location of marker pins. He says that the oral testimony of both Mr. Boucher and Mr. Steele was clear that they saw a lot of greenery and freshly logged timber. Further, there were branches and twigs shown in the photos as well as sawdust, which was present in at least one photo. The Respondent submits that Mr. Steele was very certain about the timing of logging in stump cruise area "A" and while less comfortable about stump cruise area "B", it was the only evidence the Panel had. The Respondent also notes that neither the District Manager nor the Review Panels heard evidence from Mr. Steele or Mr. Zeglen, nor did they have the benefit of the photos.

The Panel finds that stump cruise area "A" was selectively logged after June 15, 1995. Mr. Steele had no hesitation in placing a time-line of 8-12 months prior to January 1997 as the period within which the logging in stump-cruise area "A" took place. The Panel has also had a chance to review the photos tendered in evidence by Mr. Boucher. We find that, contrary to the submissions of counsel for Mr. Luoma, there is evidence of branches with needles and that their orientation indicates that they were cut from the bole of a tree. Furthermore, there is evidence of many fine twigs, some still with foliage on them, again an indication of a more recent harvest.

The Panel finds that it is much more difficult to determine the harvest date for stump cruise area "B". Mr. Steele did not actually do the stump cruise, although he had walked the area in January 1997. We know that 1076 cubic metres in total were billed in 1995, and that, according to the Review Panel decision, approximately 700 cubic metres came off property located near Granite Bay belonging to C.R. Urike (last name unclear) in the summer and fall of 1995. This, in part, supports the contention that the stump cruise area "B" and the "stumped area" wood (total of 286.4 m<sup>3</sup>) came off prior to June 15, 1995. Further the dug-out and a two-story residence were likely built within this time frame. As well, it is known that 493.3 cubic metres, under Mr. Luoma's timber mark, were purchased by Campbell River Mills in 1996, and 150 cubic metres came from Mr. Kirkby's property. This would mean that, at most, only 347 cubic metres could have been taken from the Crown land in 1996. This again lends support to the wood in stump cruise area "A" being taken in 1996, and the wood in stump cruise area "B" being taken before that time.

The Panel also finds the letter from Mr. Miller, of Timber West, which refers to his estimate that the timber “immediately north” of Lot A was cut sometime within the previous two years of his December 1996 visit, as support for the proposition that the wood in stump cruise area “B” and the “stumped area” was logged prior to June 15, 1995.

Finally, the Panel notes that the pattern of harvest in stump cruise area “B” was the same as the immediately adjacent private land (i.e. both were clear-cut). This again lends some weight to the proposition that this area was harvested along with the private land harvest, which appears to have been completed in 1995.

The Panel finds that, on the balance of probabilities, and based on information not available to the District Manager at the time he made his decision, stump cruise area “A” was logged after June 15, 1995, and stump cruise area “B” and the “stumped area” was logged prior to June 15, 1995. The following calculations are done according to the methodology employed by the District Manager in his March 6, 1998 determination, which both Mr. Luoma and the Respondent submitted should be applied, if any new calculation were to be done. It is noted that Mr. Boucher testified that while an average value of \$84.85 had been used in the calculations, the actual value of the timber harvested from stump cruise area “A” was greater as the timber had been highgraded and the best logs harvested. However, the Panel will use the average value in its calculations, as did the District Manager.

**Stump Cruise Area “A”**

Sections 96(1) and 119 of the *Code*

Volume: 103 stumps, 232 m<sup>3</sup>

Determination of Penalty

1996 stumpage + bonus rate = \$23.19/m <sup>3</sup> x 232 m <sup>3</sup> =	\$5,380.08
1996 average market value = \$84.85/m <sup>3</sup> x 232 m <sup>3</sup> = \$19,685.20	
Penalty calculation = 1.5 x \$19,685.20 =	<u>\$29,527.80</u>
TOTAL	<u>\$34,907.88</u>

**Stump Cruise Area “B” and “Stumped Area”**

Sections 138(1) and 139 of the *Forest Act*

Volume: 97 stumps, 150 m<sup>3</sup> plus volume of “stumped area” 136.4 m<sup>3</sup> for a total volume of 286.4 m<sup>3</sup>

Determination of Penalty

1996 Stumpage Rate = \$23.19	
Penalty Rate x 2 =	<u>\$46.38</u>
Billing Rate =	<u>\$69.57</u> x 286.4 m <sup>3</sup> =
	<u>\$19,924.85</u>

**Total for Stump Cruise Area “A” plus Cruise Area “B” and “Stumped Area”**

Volume:  $232 \text{ m}^3 + 286.4 \text{ m}^3 = 518.4 \text{ m}^3$

Penalty:  $\$34,907.88 + \$19,924.85 =$   $\$54,832.73$

Counsel for Mr. Luoma submits that if a contravention for unauthorized harvesting of timber is found, it should be pursuant to section 138(1) of the *Forest Act* and the penalty should be assessed under that Act and not the *Code*. He said that if the Panel was not sure when the logging occurred, that it should apply the principle that if the punishment for an offence has increased since the time of the commission of the offence, that the accused is entitled to the benefit of the lesser punishment. The Panel finds that this principle is not applicable to this case, as it has found that the logging of stump cruise area "A" occurred after June 15, 1995, when the *Code* came into effect. The Panel has found that there is some uncertainty as to when stump cruise area "B" and the "stumped area" were logged, and even Mr. Steele's estimate of 12-18 months prior to January 1997, place it around the time the *Code* came into effect. As stated above, the Panel has concluded that this harvesting took place prior to June 15, 1995 and thus the provisions of the *Forest Act* are applicable.

The Panel notes that if the entire 518.4 cubic metres was considered to have been taken after June 15, 1995, as urged by the Respondent, the penalty would be \$78,0001.06.

### **3. Whether there was a contravention of section 97(2) of the Code.**

Counsel for Mr. Luoma submits that the District Manager and Review Panel erred in finding that Mr. Luoma contravened section 97(2) of the *Code*. He argues that if it is found that the unauthorized harvesting of timber was deliberate and wilful, then he must have ascertained the boundaries of the private land and then deliberately chose to harvest beyond them onto Crown land. If this is the case, counsel for Mr. Luoma says that Mr. Luoma cannot have contravened section 97(2) of the *Code* which provides that: " before a person cuts or removes timber from private land adjacent to Crown land, the person must ascertain the boundaries of the private land."

Counsel for Mr. Luoma also argues that section 96(1) applies when someone *knowingly* cuts timber unlawfully and section 97(2) applies when someone *mistakenly* cuts timber unlawfully. He says that the District Manager and Review Panel, in finding that Mr. Luoma had committed wilful theft under the *Forest Act* and that the action was deliberate under the *Code*, could not find that Mr. Luoma had failed to ascertain the boundaries because that would not amount to wilful theft. In the alternative, Counsel for Mr. Luoma submitted that even if the Review Panel was correct, it would follow that the failure to ascertain the boundaries of the private land would have to be included within the contravention of section 96 and that Mr. Luoma is being penalized twice for the same act.

The Forest Practices Board submits that it is well established that section 96 is not restricted to those who knowingly cut timber unlawfully. Persons can be found to have contravened section 96(1) of the *Code* without having either knowingly or



negligently done so. Further, the Forest Practices Board notes that the Commission has found on many occasions that due diligence is not a defence to a contravention of section 96(1) of the *Code*. It also submits that a person can be found to be in contravention of both section 96(1) and section 97(2) as they are not mutually exclusive. Finally, it submits that it is not double jeopardy to find a contravention of both section 96(1) and section 97(2) of the *Code*. The Forest Practices Board argues that even under the principles set out in *Kieinapple v. R.*, [1975] 1 S.C.R. 729 (S.C.C.), which was a criminal case, a single action can lead to more than one contravention if the contraventions involve a different legal prohibition. In this case, the Forest Practices Board submits that section 96(1) and 97(2) specify different legal requirements and both can be contravened "without unfair double discipline."

The Respondent says that it finds the first part of counsel for Mr. Luoma's argument pertaining to section 97(2) compelling. The Respondent agrees with the argument that section 97(2) is directed towards a person who harvests on his own property and that the requirement of that section is that the person must ascertain the boundaries of his property before cutting timber. The Respondent says that Mr. Luoma may very well have done that. The Respondent says that there is no evidence that either circumstantially or directly establishes that Mr. Luoma failed to ascertain the boundaries of his property before he harvested his own timber. Therefore, the Respondent submits that Mr. Luoma should not be found to have contravened section 97(2) of the *Code*. The Respondent goes on to say that such a finding pales in comparison to the central issue here, which is the unauthorized harvesting of 518.4 cubic metres of timber, worth a considerable amount of money.

The Panel finds that, as a matter of statutory construction, sections 96(1) and 97(2) are not mutually exclusive. Further, there is no language in section 96(1) that would require that a person "knowingly" cut timber unlawfully. In fact, the majority of cases before the Commission dealing with section 96(1) have not involved deliberate acts of trespass. The Commission has also found in a number of cases that due diligence is not a defence to a contravention of section 96(1) of the *Code*. However, in this case, where a finding of a wilful or deliberate trespass has been made out, the Panel finds that Mr. Luoma knew where the boundaries of his private land were and that he deliberately ignored the northern boundary in taking timber from the adjacent Crown land. The evidence is that the boundary was properly ascertained in 1991 by Mr. Young, a legal surveyor. While there was evidence that some white boundary markers had been moved and that a blue ribboned line was found 15-20 metres north of the property line, there was no evidence of who hung that line. It appears that this may be evidence of a deliberate attempt to hide the unauthorized harvesting of timber in stump cruise area "B" and the "stumped area." No explanation to the contrary was offered at the hearing.

The Panel finds that all the evidence points to a deliberate trespass, including the placement of moss on the stumps in stump cruise "A" and the considerable amount of timber taken from Crown land. It therefore finds that the contravention of section 97(2) should be rescinded. However, the fact that the trespass was

deliberate goes to the penalty assessed. In this case, the District Manager assessed a penalty of 1.5 times the market value under the *Code* and 2 times the stumpage rate under the *Forest Act*. The Panel agrees with these penalty rates.

**4. Whether the Review Panel erred in referring the *Forest Act* determination back to the District Manager for him to reconsider and make a new determination and hold a new OTBH meeting relative to section 138 and 139 of the *Forest Act*, after having already found that section 138 and 139 had been contravened.**

Counsel for Mr. Luoma submits that, although in appropriate circumstances, the Review Panel could refer a matter back to the District Manager to cure a procedural irregularity, in this case it was inappropriate. He argues that, in this case, Mr. Sluggett made specific findings of fact as to Mr. Luoma's state of mind, and found that the cutting was a deliberate act under the *Code*, and that the cutting constituted wilful theft under the *Forest Act*. Counsel for Mr. Luoma argues that at any new hearing arising as a result of the matter being remitted back to the District Manager, Mr. Luoma would have to convince the District Manager to change the personal assessment he had already made. Counsel for Mr. Luoma says that a reasonable apprehension of bias existed and that, in this case, the Review Panel erred in remitting the matter back to Mr. Sluggett.

Counsel for Mr. Luoma referred to a decision of the Ontario Divisional Court in *The Township of Vespra and Ontario Municipal Board et al.* (1983), 43 O.R. (2d) 680, where the Court quashed a decision of the Ontario Municipal Board and referred the matter back to the board for a new hearing before a panel of the board differently constituted. In that case, the Court referred to some strong statements made by the original panel of the Ontario Municipal Board, and stated:

These statements must, of course, be kept in perspective. The members of the board were in the process of making their decision. The statements are nevertheless emphatic and perhaps rightly so, in the circumstances, but they could lead a reasonable person to the conclusion that human nature might conceivably come into play and make it difficult for the panel to draw back from the positions expressed in that fashion and to bring an impartial mind to bear on the issue to be determined. Standing alone, these emphatic expressions of opinion on the part of the panel would not lead this court to a conclusion that there was a reasonable apprehension of bias. But, when there is added to those strong statements the actual decision of 1983, in the circumstances which I have just detailed, made without jurisdiction and contrary to natural justice, based upon the evidence of 1976 without regard for any change in circumstances in the intervening seven-year period, and, in particular, without evidence of population projections, the government policy having lost its relevancy, the reasonable apprehension of bias by Vespra is inevitable in our view.

Counsel for Mr. Luoma submits that given the findings of the District Manager that Mr. Luoma's actions were deliberate and wilful, combined with the failure to afford

him an OTBH on the *Forest Act* contraventions, a reasonable apprehension of bias existed and the Review Panel should not have referred the matter under the *Forest Act* back to Mr. Sluggett.

The Respondent submits that this issue need not be addressed as the Panel has *de novo* powers and can make a new decision based on all the evidence before it. The Respondent also notes that section 145(2) of the *Forest Act* is very clear in providing that "the person responsible for conducting the review may confirm, vary or rescind the determination, order or decision or *refer it back to the person who made it, with or without directions.*" [emphasis added]

The Panel concurs with the Respondent that it need not address this issue as it has *de novo* powers and has broad powers under section 149 of the *Forest Act* to make any order that it considers appropriate in the circumstances. The Forest Practices Board referred to *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561, where Mr. Justice Beetz found at page 582 that there was " a general principle in holding that the denial of natural justice in the earlier proceedings could be cured in appeal, and implicitly but necessarily, that the decision appealed from was not a complete nullity since it could be appealed." The Panel would also note that the fact that the *Forest Act* clearly provides for referral by the reviewer back to the person who made the initial determination distinguishes this case from *Vespra*.

**5. Whether the Review Panel erred in directing the District Manager to investigate the use of the timber mark involved in order to determine if there are other contraventions of the *Forest Act*, *Code* and supporting regulations.**

The Review Panel, at the conclusion of both its May 22, 1997 decisions:

directed the District Manager to request his District Compliance Leader to investigate the comments in the requester's submission relative to allowing or directing the TM (timber mark) issued for his specific areas to be applied to timber cut from other areas. This should be done in order to determine if there are other contraventions of the *Forest Act*, FPC, or supporting regulations.

Counsel for Mr. Luoma submits that this direction was inappropriate in that the Review Panel departed from its appellate function and assumed a prosecutorial function. He said that the Review Panel is not an investigatory agency and that while the courts may suggest, for example, an investigation of perjury connected with the offence at hand, if the facts disclose another offence, the courts will leave the decision to investigate up to the Crown. Counsel for Mr. Luoma submits that the Review Panel's direction, combined with the referral back to the District Manager, gives rise to a reasonable apprehension of bias.

The Respondent submits that the Panel need not address this issue as it has *de novo* powers under both the *Code* and the *Forest Act*, and that this proceeding can cure any procedural errors made by the Review Panel.

The Panel agrees with the Respondent that if there has been an error here, it can be cured by this proceeding, and it therefore will not comment further on this issue.

## **DECISION**

Section 138 of the *Code* provides that the Commission may confirm, vary or rescind the decision appealed from and make any decision that the person whose decision is appealed could have made. Section 149 of the *Forest Act* provides that an appeal board may confirm, vary or rescind the decision appealed from and make any order that the appeal board considers appropriate in the circumstances.

The Panel upholds the decisions of the Review Panels that Mr. Luoma contravened section 96(1) of the *Code* and section 138(1) of the *Forest Act*. However, it varies the penalties imposed and finds that the penalty for the contravention of section 96(1) of the *Code* shall be \$34,907.88 and the penalty for the contravention of section 138(1) of the *Forest Act* shall be \$19,924.85. The total penalty is \$54,832.73.

The Panel rescinds the findings of a contravention of section 97(2) of the *Code* and the penalty assessed under that section.

Toby Vigod, Chair  
Forest Appeals Commission  
Appeal Board

March 12, 1999